Supreme Court, U.S.
FILED
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No. _____

In the Supreme Court of the United States

JOHN A. RAPANOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether Petitioner's criminal convictions in Federal District Court for filling isolated wetlands in violation of 33 U.S.C. § 1311 (a) and affirmed by the Sixth Circuit Court of Appeals on December 15, 2000 violates the Due Process Clause of the Fifth Amendment in light of this Court's decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al, ___ U.S.___, ___ S.Ct. ____, L.Ed.2d____, 2001 WL 15333 (U.S.) (January 9,2001) and Fiore v. White, 531 U.S. ____, ____ S.Ct. ___, ____L.Ed.2d ____, 2001 WL 15674 (U.S.) (January 9,2001).

II.

Does Section 404 of the Clean Water Act 33 U.S.C. § 1344(a) give the Army Corps of Engineers or the Environmental Protection Agency jurisdiction over isolated wetlands not adjacent to any navigable or open waters.

III.

Whether where the government states that they have not proved an element of the crime can the conviction be sustained under Fiore v. White 531 U.S. ____, ____S.Ct. ____, L.Ed.2d ____, 2001 WL 15674 (U.S.) (January 9, 2001).

PARTIES TO THE PROCEEDING

Petitioner

John A. Rapanos, an individual with no corporate affiliations.

Respondent

The United States of America.

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The Opinion from which Petitioner seeks review was filed on December 15, 2000 and was recommended for full text publication. A copy of this Opinion is included in the Appendix. (App. A at 1a-9a.)

The United States District Court had jurisdiction over this case pursuant to 18 U.S.C. § 3231, because the Government alleged in a superseding indictment upon which Petitioner was tried violations of 33 U.S.C. § 1311(a); 18 U.S.C. § 2 and 18 U.S.C. § 1512 by the Petitioner. The United States Court of Appeals for the Sixth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742 (a)(1).

JURISDICTION OF THE COURT

The Opinion affirming Petitioner's conviction was entered on December 15, 2000. This Court has jurisdiction to grant this Petition for Certiorari under 28 U.S.C. § 1254 and Supreme Court Rule 13.1.

THE STATUTES INVOLVED

33 U.S.C. § 1311(a) provides

> § 1311. Effluent limitations
>
> Illegality of pollutant discharges except in compliance with law.
>
> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and

1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1344 states in pertinent part:

> Discharge into navigable waters at specific disposal sites.
>
> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specific disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application.

33 U.S.C. § 1319 provides in pertinent part:

> (2) Knowing violations
>
> Any person who—
>
> (A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328 or 1345 of this title, or any permit condition or limitation implementing any such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program issued under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or . . .

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment of not more than 3 years, or by both. . . .

33 U.S.C. § 1362 provides in pertinent part:

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . . .

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * * * *

(12) the term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft. . . .

* * * * *

> (14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. . . .

* * * * *

> (19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

THE CONSTITUTIONAL PROVISIONS INVOLVED

Art. 1 § 8, cl. 3 of the United States Constitution provides in pertinent part:

> Section 8. The Congress shall have the power to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes;

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be . . . deprived of life, Liberty, or property, without due process of law.

STATEMENT OF THE CASE

On June 9, 1993, a two count indictment was returned against Petitioner, charging him with illegally filling wetlands on a portion of a 175 acre parcel of property he owned in Bay County, Michigan (the Salzburg Road property) between December 1988 and November 1989, in violation of 33 U.S.C. § 1311(a), and intimidating a witness, in violation of 18 U.S.C. §§ 2 and 1512. The case proceeded to trial on a superseding indictment on July 1, 1994. On July 12, 1994, trial Judge Zatkoff declared a mistrial. On July 27, 1994 the grand jury returned a second superseding indictment containing the original wetland filling violation, the two witness tampering counts and added a fourth count charging unlawful wetlands filling from December 1989 through October of 1991.

The trial on this indictment began on February 1, 1995. After the government rested, the trial judge dismissed the two witness tampering counts. On March 7, 1995, the jury returned verdicts on both of the wetlands counts.

On March 28, 1995, Petitioner filed a Motion for Judgment of Acquittal and for a New Trial. On August 3, 1995, Judge Zatkofff denied Petitioner's Motion for Judgment of Acquittal but granted his Motion for a New Trial.

The government appealed and the grant of a new trial was reversed by the United States Court of Appeals for the Sixth Circuit. United States v. Rapanos, 115 F.3d 367 (6th

Cir. 1997). The jury verdict was reinstated and the case remanded for sentencing.

After the remand, Petitioner filed a Motion to Amend the Motion for New Trial, which was denied on April 13, 1998. Subsequently, both sides filed sentencing memoranda concerning sentencing factors and the sentencing guideline calculations.

On December 2, 1998 the trial court sentenced the Petitioner to three (3) years probation on the wetlands counts, imposed a fine of $185,000.00 and required that he do two hundred (200) hours of community service work. Petitioner filed a timely claim of appeal from his conviction and sentence. The government filed a claim of appeal from his sentence.

On December 15, 2000, the Sixth Circuit Court of Appeals affirmed Petitioner's conviction for violating 33 U.S.C. § 1311(a) and remanded the matter to the district court for resentencing pursuant to the court's opinion.

On January 9, 2001, this Court decided Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al., 531 U.S._____, ____S.Ct._____, _____L.Ed.2d _____ (2001), and Fiore v. White, 531 U.S. ____, ____S.Ct.____, ___L.Ed.2d____ 2001 WL 15674 (U.S.) (2001).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

UNDER THE AUTHORITY OF SOLID WASTE AGENCY OF NORTHERN COOK COUNTY V. UNITED STATES ARMY CORPS OF ENGINEERS, ET AL. AND FIORE V. WHITE, MR. RAPANOS' CONVICTION VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Petitioner, John A. Rapanos, was convicted of two counts of filling wetlands in violation of the Clean Water Act, 33 U.S.C. § 1311(a). The property involved consisted of one hundred seventy-five (175) acres in Williams Township, Bay County, Michigan. It contained no buildings and is bordered by an interstate highway and a major state highway. The parcel was at least twenty (20) miles from the nearest navigable waterway, Saginaw Bay.

At trial it was the government's theory that Petitioner discharged pollutants, sand and other soils, onto twenty-nine (29) of the one hundred seventy-five (175) acres, which it alleged were regulated wetlands under the Clean Water Act.

At trial, the arguments focused on whether the Petitioner discharged pollutants into an area subject to regulation under the Clean Water Act. Petitioner argued that the areas were not wetlands as defined by the Clean Water Act, were not adjacent to any navigable waters and were not even adjacent to each other. The government introduced a map of what it considered to be the wetland areas. (App. E at 35a.) The map clearly shows that the wetland areas were not

adjacent to any navigable waterways or even adjacent to each other.

One government witness testified that according to U.S. Geological Survey Maps, any water flowing from Mr. Rapanos' property would flow into the Lobodzinski Drain, then into the Hoppler Drain and from there into the Kawkawlin River, ultimately reaching the Saginaw Bay, some twenty (20) miles away. Petitioner's witnesses testified that the parcel contained no swamps, marshes, bogs or regulated wetlands. At trial, Petitioner's witnesses testified that none of the subjected areas possessed the physical characteristics that identified wetlands under the Clean Water Act. The Petitioner's witnesses testified that, even if the subjected areas were wetlands, they must be classified as "isolated wetlands" as they lacked a surface water connection to any other body of water and were not even adjacent to each other.

In Solid Waste Agency of Northern Cook County, the Court held that section 404 of the Clean Water Act did not give the Army Corps of Engineers jurisdiction over "ponds which were not adjacent to open waters." (Slip op. 7) (emphasis in original). The Court also made clear that its holding in U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed 2d 419 (1985), was limited to conferring jurisdiction to the Corps over wetlands that "actually abutted on a navigable waterway." (Slip op. 6). The Court stated:

> It was the significant nexus between the wetlands and navigable waters that informed our reading of the CWA in Riverside Bayview Homes. Indeed we did not 'express any opinion' on the 'question of the authority of the Corps to regulate discharges of fill material

> into wetlands that are not adjacent to bodies of open water . . .' Id. At 131-132 n.8. In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.

Id. at 6,7 (emphasis in original).

By limiting Riverside the logical conclusion from Solid Waste is that neither the Army Corps of Engineers nor the Environmental Protection Agency (the federal regulatory agency in this case) would have jurisdiction under the CWA over wetlands that were not adjacent to navigable or open waters, or in other words were isolated from any navigable or open waters. In the present case, the wetlands Petitioner was convicted of filling were no where near open or navigable waters. Trial testimony established that the nearest navigable waterway was Saginaw Bay, approximately twenty (20) miles away. Under principles of Due Process, Petitioner's federal conviction can not stand.

On the same day that the Court decided Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, it decided Fiore v. White, 531 U.S. ____, ____S.Ct., ___L.Ed.2d____, 2001 WL 15674 (U.S.) (January 9, 2001). Fiore was convicted of operating a hazardous waste facility without a permit. After his conviction became final, the Pennsylvania Supreme Court interpreted the statute he was accused of violating for the first time and made clear that Fiore's conduct was not within the scope of the statute. This Court granted certiorari to determine if the conviction was proper under the Fourteenth Amendment of the U.S. Constitution. On review, the Court stated that the

question was "simply whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore of conduct that its criminal statute, as properly interpreted, does not prohibit." This Court answered the question in the negative and held that Fiore's conviction and continued incarceration violated the Due Process Clause of the Fourteenth Amendment. Solid Waste clarified the statute, section 404 of the Clean Water Act, to limit the Army Corps of Engineers jurisdiction to areas that are adjacent to bodies of open water. This was the law -- properly interpreted -- at the time of Mr. Rapanos' conviction. Since the wetlands at issue in this case were not adjacent to any bodies of open or navigable waters, the Due Process Clause of the Fifth Amendment forbids the federal government from convicting him, and his conviction should be reversed and vacated.

A close reading of the opinion and dissent in Solid Waste teaches that § 404 and regulation 33 CFR § 323.2 (a)(5) (1978) are ambiguous -- as it is unclear from the Court's decisions in both Solid Waste ("The exact meaning of § 404(g) is not before us and we express no opinion on it") and Riverside ("We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, see CFR §§ 323, 2(a)(2) and (3) and we do not express any opinion on that question") that the federal government should assume jurisdiction over isolated non-adjacent wetlands -- the rule of lenity requires that Petitioner's conviction be vacated. Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955), ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.

What this Court stated in Jones v. United States, ___ U.S. ___, 120 S.Ct. 1904, ___ L.Ed.2d ____, (2000) that

"Given the concerns brought to the fore in Lopez, it is appropriate to avoid the constitutional question that would arise were we to read § 844(I) to render the 'traditionally local criminal conduct' in which petitioner Jones engaged 'a matter for federal enforcement." (citation omitted). The Court went on to state "We have instructed that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971) and that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite,' United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222, 73 S.Ct. 227, 97 L.Ed. 260 (1952). We have cautioned, as well, that 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal state balance in the prosecution of crimes. Bass, 494 U.S. at 349, 92 S.Ct. 515."

In Solid Waste, this Court recognized that there were serious constitutional and federalism questions raised by the Army Corps of Engineers' interpretation of § 404(a). (Slip op. p.8). In light of this Court's interpretive guides and expressed state federalism/constitutional problems with the reach of § 404(a), this Court should apply the rule of lenity to vacate Petitioner's conviction.

II.

THE COURT SHOULD GRANT CERTIORARI TO ANSWER THE QUESTION OF THE AUTHORITY OF THE FEDERAL GOVERNMENT TO REGULATE DISCHARGES OF FILL MATERIAL INTO ISOLATED WETLANDS THAT ARE NOT ADJACENT TO

BODIES OF OPEN OR NAVIGABLE WATERS NOT ADDRESSED IN SOLID WASTE AGENCY OF NORTHERN COOK COUNTY V. UNITED STATES ARMY CORPS OF ENGINEERS ET AL.

In Solid Waste, the Army Corps of Engineers interpreted section 404 of the Clean Water Act to confer federal authority over an abandoned sand and gravel pit which contained some permanent and seasonal ponds. This Court framed the issue as "whether the provisions of § 404(a) may be fairly extended to these waters, and, if so, whether Congress could exercise such authority consistent with the Commerce Clause, U.S. Const., Art. I § 8 cl.3. The Court "answered the first question in the negative" and "did not reach the second." (id. p.3).

This Court should grant certiorari of this case to resolve the unanswered question of Congress' authority to regulate isolated wetlands that do not abut navigable or open waters. The issue is ripe for review. As this Court stated in Solid Waste, "The exact meaning of § 404 is not before us and we express no opinion on it . . ." and "Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited. See United States v. Morrison, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000); United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995)."

The dissent in Solid Waste was more forthright. The dissenters, interpreting the majority opinion and applying its holding to future cases, stated: "In its decision today, the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps' assertion

of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each." (p.10). The dissenters went on to state:

> If as I believe, actually navigable waters lie at the very heart of Congress' commerce power and 'isolated' nonnavigable waters lie closer to (but well within) the margin,"'isolated wetlands' which are themselves only marginally 'waters' are the most marginal category of 'waters of the United States' potentially covered by the statute. It was the question of the extension of federal jurisdiction to that category of 'waters' that the Riverside Bayview Court reserved. The question is not presented in this case. (Fn.13 p.15).

In Lopez, supra, this Court "identified three broad categories of activity that Congress may regulate under its commerce power." 514 U.S. at 558 "First Congress may regulate the use of the channels of interstate commerce." Id. (i.e. navigable and open waters). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, . . . even though the threat may only come from intrastate activity (i.e. wetlands that abut navigable or open waters.) Finally, Congress', commerce power authority includes the power to regulate those activities having a substantial relation to interstate commerce." Morrison, 529 U.S. 598, 120 S.Ct. 1740, 1748 (2000) (However the activity must be commercial in nature. Lopez, supra, and Jones v. United States, ___ U.S. ___, 120 S.Ct. 1904 (2000). Isolated wetlands on personal property do not qualify as a proper subject for regulation by the federal government under Congress' Commerce Clause power. This Court should grant certiorari to resolve any uncertainty in Commerce Clause

jurisprudence and the delicate state federal balance in enforcement of environmental protection laws.

III.

UNDER FIORE v. WHITE, PETITIONER'S CONVICTION SHOULD BE VACATED AS IT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

In Fiore, this Court reiterated a fundamental principle of federal criminal law. This Court stated, "We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of the crime beyond a reasonable doubt". (citations omitted). The Due Process Clause of the Fifth Amendment is no less stringent.

In the present case, one of the elements the prosecutor was required to prove beyond a reasonable doubt was that the Petitioner knew that the areas into which he was placing fill were wetlands. And the jury was so instructed. (App. E at 36a-44a.) However, the prosecutor, after the proofs were closed admitted that "the government never attempted to gather any evidence to the effect that the defendant know that he was putting fill into U.S. waters, never attempted to present any evidence on that point either, not anything thinking that was an element." Since the jury returned a general verdict we can not know if they found that the Petitioner acted with knowledge and since the prosecutor admitted that he did not attempt to prove knowledge, Petitioner's conviction violates the Due Process Clause of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted or the matter remanded to the Sixth Circuit Court of Appeals for reconsideration in light of Solid Waste.

Respectfully Submitted,

/s/_____ _____
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 98-2424; 99-1074/1578

UNITED STATES OF AMERICA, *Plaintiff-Appellee/ Cross-Appellant* (99-1074),	)
v.	)
JOHN A. RAPANOS, *Defendant-Appellant (98-2424; 99-1578)/ Cross-Appellee.*	)

Appeal from the United States District Court
for the Eastern District of Michigan at Bay City
No. 93-20023—Lawrence P. Zatkoff, Chief District Judge.

Argued: October 24, 2000

Decided and Filed: December 15, 2000

Before: MARTIN, Chief Judge; NORRIS, Circuit Judge; FORESTER, District Judge.*

OPINION

BOYCE F. MARTIN, JR., Chief Judge. John A. Rapanos appeals the district court's denial of his 1999 motion for new trial as well as his 1995 conviction for filling wetlands in violation of 33 U.S.C. § 1311(a). The United States cross-appeals Rapanos's sentence of three years' probation and a $185,100 fine and assessment. For the following reasons, we AFFIRM the denial of Rapanos's 1999 motion for new trial, AFFIRM his conviction, and REMAND with specific instructions for resentencing.

I.

The facts of this case were set forth in detail by this Court in *United States v. Rapanos,* 115 F.3d 367 (6th Cir. 1997), and need not be restated here. On appeal, Rapanos challenges his conviction, claiming errors in the jury instructions, prosecutorial misconduct, and insufficiency of the evidence. Rapanos also appeals the district court's denial of his 1999 motion for new t rial. We have reviewed each of these claims and find that the district court did not err.

---

* The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

II.

The government appeals Rapanos's sentence on three grounds: 1) that the district court improperly granted Rapanos two one-level downward departures; 2) that the district court improperly granted Rapanos a two-level decrease for acceptance of responsibility; and 3) that the district court erred in not enhancing Rapanos's sentence for obstruction of justice. We conclude that the district court erred in granting Rapanos two one-level downward departures and a two-level decrease for acceptance of responsibility. The district court did not err in not enhancing Rapanos's sentence for obstruction of justice.

A.

The district court granted Rapanos a two-level downward departure under § 2Q1.3(b)(1)(A) of the U.S. Sentencing Guidelines Manual (1994), which addresses "an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment." The district court also granted a two-level downward departure under § 2Q1.3(b)(4), which involves discharges "without a permit or in violation of a permit." The district court went beyond these two two-level downward departures and added a separate one-level downward departure under each provision, reasoning,

> [T]hese guidelines are geared toward the discharge of harmful pollutants that result in actual contamination. In this case, the pollutant, in quotes, was sand that was moved from one end of a piece of property owned by

> the defendant to another end of the property owned by the defendant. It was not any toxic discharge, there were no pesticides, no nuclear material, no sewage, no paint, lead or other harmful things, just sand and soil that was already on this private property.
>
> In addition, the Court finds that there was little harm or risk. It's not like you're filling a flowing river or stream with contaminants or poison.

We review a district court's decision to depart from the Sentencing Guidelines for an abuse of discretion. *See Koon v. United States,* 518 U.S. 81, 91 (1996). According to 18 U.S.C. § 3553(b) (2000), a sentencing court should impose a sentence prescribed by the guidelines "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." A district court abuses its discretion when it takes into account a factor already considered by the Commission in the guidelines. *See Koon,* 518 U.S. at 111. If a factor is not mentioned in the guidelines, the district court should consider "whether it is sufficient to take the case out of the guideline's heartland." *Id.* at 96. The Commission has stated that "such cases will be highly infrequent." U.S. Sentencing Guidelines Manual ch. 1, pt. A, p. 6 (1994).

In the present case, the factors relied upon by the district court in its downward departures were adequately considered by the Commission in the guidelines. The

guidelines provide for different types of pollutants by considering them under two different sections; Section 2Q1.2 deals with hazardous or toxic substances and pesticides and provides a higher base offense level than does § 2Q1.3, which addresses "other environmental pollutants" and under which Rapanos was sentenced. Both of the district court's two-level downward departures also considered the nature of the pollutant and the risk involved. The district court granted a two-level downward departure under Application Note 4, which provides for a two-level departure in either direction "[d]epending upon the harm resulting from the . . . discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation." The district court's second two-level downward departure came from Application Note 7, which also grants a two-level departure in either direction "depending upon the nature and quantity of the substance involved and the risk associated with the offense." The district court's stated concerns about the type of pollutant and the risk involved were thus considered in three different provisions of the guidelines, all of which the district court applied before granting the additional downward departures.

The district court provided no indication of any factors that would carry this case outside the "heartland" of environmental crimes not involving toxics, hazardous wastes, or pesticides. In fact, the district court's downward departure seemed based primarily on a fundamental disagreement with the sentencing guidelines pertaining to environmental criminals, as the district court made clear in announcing its final decision that Rapanos would receive no jail time:

> I don't know if it's just a coincidence that the case that I just sentenced prior to this case has come into this court, that was the case of Mr. Gonzalez, who was a person selling dope on the streets of the United States. He is an illegal person here. He's a citizen of Cuba, not an American citizen. He has a prior criminal record. . . .
>
> So here we have a person who comes to the United States and commits crimes of selling dope and the government asks me to put him in prison for ten months. And then we have an American citizen who buys land, pays for it with his own money, and he moves some sand from one end to the other and government wants me to give him sixty-three months in prison. Now, if that isn't our system gone crazy, I don't know what is. And I am not going to do it.

A fundamental disagreement with the law and an inappropriate comparison to a wholly unrelated case are not permissible factors to consider in granting downward departures not provided for by the guidelines. The Commentary to § 5K2.0, which addresses grounds for departure from the guidelines, states, "[D]issatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range." While we affirm the two two-level downward departures under Application Notes 4 and 7, the district court's grant of two additional one-level downward departures in this case was an abuse of discretion.

B.

The district court also granted Rapanos a two-level acceptance of responsibility decrease pursuant to an exception to § 3E1.1 found in Application Note 2 of the Commentary: "In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt." The district court justified its decrease in its sentencing memo: "Although the Defendant put the Government to its burden of proof at trial, it was not because he denied the factual element of his guilt, i.e. altering the land, but, rather, he challenged whether the land qualifies as wetlands, i.e. the applicability of the statute to his conduct." A district court's determination of whether a defendant has accepted responsibility is a factual matter, and we will not disturb it unless it is clearly erroneous. *United States v. Williams,* 940 F.2d 176, 181 (6th Cir. 1991).

While Rapanos did primarily challenge the applicability of the statute to his conduct, Application Note 2 goes on to state, "In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct." Rapanos's statements and conduct before trial certainly did not "clearly demonstrate[] acceptance of responsibility." For example, Rapanos fired a consultant after the consultant found nearly fifty acres of wetlands on the property, ignored cease and desist orders from both the Michigan Department of Natural Resources and the Environmental Protection Agency, never completed a permit application, and refused to provide

requested financial information to the probation officer conducting the presentence report.

Furthermore, Application Note 1 of the Commentary to § 3E1.1 (1994) lists eight appropriate considerations for determining whether a defendant qualifies for an acceptance of responsibility decrease. Rapanos has met none of these eight factors. Simply because Rapanos put the government to its burden of proof on the applicability of the statute to his conduct rather than on the facts themselves does not mean he automatically receives an acceptance of responsibility reduction. "To qualify for this reduction, the defendant bears the burden of showing by a preponderance of the evidence that he . . . has accepted responsibility for the crime committed." *Williams*, 940 F.2d at 181. Rapanos cites no examples of his acceptance of responsibility, and neither does the district court. Because of the lack of proof that Rapanos "clearly demonstrated acceptance of responsibility," the district court's grant of an acceptance of responsibility sentence reduction constituted clear error.

C.

On cross-appeal, the government argues that Rapanos should have received a two-level enhancement for obstruction of justice under § 3C1.1 of the guidelines. Our standard for reviewing a district court's application of § 3C1.1 is set forth in *United States v. McDonald*, 165 F.3d 1032 (6th Cir. 1999). We apply the following three-step review: 1) we review a district court's findings of fact under a clearly erroneous standard; 2) because it is a mixed question of law and fact, we review de novo a district court's determination of whether the facts constitute an obstruction of justice; and 3) if obstruction

of justice is found, the enhancement must be applied. *Id.* at 1034. We have reviewed the district court's findings of fact and find no clear error. Because the record was unclear on some relevant facts, we agree with the district court's application of law to fact and conclude that its refusal to enhance Rapanos's sentence for obstruction of justice was not an error.

III.

We therefore REMAND for resentencing with the following specific instructions: the sentence calculation found at pages 19-20 of the district court's April 13, 1998, memorandum and order is correct except for the two-level reduction for acceptance of responsibility. The two one-level decreases granted orally that do not appear in the sentencing memorandum were error and should not be included in Rapanos's sentence on remand. We therefore affirm a total offense level of 12. We also AFFIRM Rapanos's conviction and AFFIRM the district court's denial of his 1999 motion for new trial.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[December 15, 2000]

Nos. 98-2424; 99-1074; 99-1578

UNITED STATES OF AMERICA, *Plaintiff-Appellee/ Cross-Appellant* (99-1074),	)
v.	)
JOHN A. RAPANOS, *Defendant-Appellant (98-2424; 99-1578)/ Cross-Appellee.*	)

Before: MARTIN, Chief Judge; NORRIS, Circuit Judge; FORESTER, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Bay City.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the denial of defendant John Rapano's 1999 Motion for new trial and Rapano's conviction are AFFIRMED. IT IS FURTHER ORDERED that the case is REMANDED for resentencing in accordance with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed May 1, 1995]

CRIM NO. 93-20023-DT

UNITED STATES OF AMERICA,
Plaintiff,

v.

D-1 JOHN A. RAPANOS,
Defendant.

HON. LAWRENCE P. ZATKOFF

GOVERNMENT'S RESPONSE, AND BRIEF IN SUPPORT TO DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL

NOW COMES the United States, by and through its attorneys, Saul A. Green, United States Attorney, and Janet L. Parker, and Terrence G. Berg, Assistant United States Attorneys, and hereby submits this response to defendant's motion for judgment of acquittal and for new trial, and, in support there of, states the following.

I. Applicable Legal Standards

Defendant's motion for judgment of acquittal, pursuant to Fed. R. Crim. P. 29(c), must be denied because, viewing the proof in the light most favorable to the government, the evidence submitted at trial in support of Counts 1 and 4 of the indictment was sufficient to allow a rational jury to conclude that the defendant was guilty beyond a reasonable doubt on each count. See United States v. Gorman, 807 F.2d 1299 (6th Cir. 1989), cert. denied, 484 U.S. 815 (1987). As the Sixth Circuit recently indicated in United States v. Hernandez, 31 F.3d 354, 358 (6th Cir. 1994):

* * * * *

[page 17]

. . . relevant by Counts 1 and 4. Therefore, when all the evidence presented in this lengthy and arduous trial was before the jury, that jury could and did reasonably conclude that the charges in Counts 1 and 4 had been proven beyond a reasonable doubt.

III. Legal Issues: Response to Defendant's Arguments IV, VI, VII, VIII, IX, and X

A. Interstate Commerce: Defendant's IV and IX

Defendant makes several related arguments that arise out of the federal definition of "waters of the United States," which includes waterways and wetlands the destruction of

which could affect interstate or foreign commerce, and wetlands "adjacent" to such waterways. The term "waters of the United States," is defined to include wetlands under the relevant federal regulations issued by the U.S. Department of the Army Corps of Engineers and the U.S. EPA. These regulations are found at 33 CFR § 328.3 (Corps of Engineers regulations), and 40 CFR § 230.3(s) (U.S. EPA regulations), and contain identical definitions of the terms "waters of the United States," and "wetlands."

The term "waters of the United States" is defined as follows:

> (a) The term "waters of the United States" means. . .
>
> > (3) All other waters such as intrastate lakes, rivers, streams, . . . **wetlands** . . . . , the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters:
> > . . .
> >
> > > (ii) from which fish or shell fish are or could be taken and sold in interstate or foreign commerce;
> >
> > . . .
> >
> > (7) Wetlands adjacent to waters (other that waters that are themselves wetlands) identified in paragraphs (s) (1) through (6) of this section.

40 C.F.R. § 230.3(s); 33 C.F.R. § 328.3(a).

Defendant argues that evidence was insufficient to allow a rational juror to conclude that the wetlands located on the defendant's property fell within the definition of "waters of the United States," as defined above. Defendant suggests that the government failed to meet this definition because it failed to prove that the wetlands filling activity[6] on defendant's property had an effect on the commercial carp harvest in Saginaw Bay, or some other quantifiable "effect" on interstate commerce. Defendant's contention apparently flows from a misunderstanding of the regulatory definition of "waters of the United States."

Under the regulatory definition, there are three ways that a wetland could qualify as a "water of the United States." First, the wetland could be of such a character that its use, degradation or destruction "could affect interstate or foreign commerce." Both Dr. Glenn Goff and DNR official Steven Sadewasser testified that the destruction of the wetlands on defendant's property would in fact affect the ecology of the connected intrastate and interstate waterways, such as Hoppler Creek, Lobodzinski Drain, the Kawkawlin River, and Saginaw Bay. A rational juror could clearly credit this testimony and conclude that the wetlands on defendant's property were "waters of the United States."

The second way a wetland could qualify as a "water of the United States" is if it were "waters from which fish or

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[6] Defendant refers to this filling activity as "the movement of inert soils on the Salzburg parcel."

shell fish are or could be sold in interstate or foreign commerce." DNR official Hal Harrington testified to seeing a carp spawning in the Hoppler drain bordering defendant's property. Commercial fisherman William Beardsley testified that carp are known to swim as far inland as they can get in order to spawn, and he further testified that he harvests carp from the Saginaw Bay (part of Lake Huron) and sells them to customers in New York state. A rational juror could well conclude that carp which spawn in the Hoppler Creek bordering defendant's property were caught by commercial fisherman in Saginaw Bay and sold in interstate commerce. The jurors could also rationally conclude that the degradation or destruction of the wetlands on the site could contribute to an aggregate adverse effect on the waters of the United States and the commerce occurring in relation to those waters. The destruction of spawning grounds for fish destined for interstate commerce is just one possible consequence of the defendant's activities.

The third way that a wetland meets the definition as a "water of the United States" is if it is "adjacent" to another "water of the United States," such as any lake, river, or stream the destruction of which could affect interstate or foreign commerce, or from which fish could be taken and sold in interstate commerce. DNR official Hal Harrington personally followed the flow of water from the Lobodzinski drain and Hoppler drain, which intersect and border defendant's property and which carry water away from the property, to the Hoppler Creek, to the Kawkawlin River, to the Saginaw Bay (where Mr. Beardsley fishes for carp to sell to New York). U.S. Geological Survey maps were also admitted into evidence showing the direct, uninterrupted water connection between defendant's property and Saginaw

Bay. A rational juror could easily conclude that the wetlands on defendant's property were "adjacent" to other waters the destruction of which would or could affect interstate commerce.

The term "adjacent" is defined under the federal regulations as "bordering, contiguous, or neighboring." The definition further states that "Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands." 40 C.F.R. § 230.3(b); 33 C.F.R. § 328.3(c). Therefore, a wetland which does not itself directly affect interstate commerce, still falls squarely within the definition of "waters of the United States" if it is bordering, contiguous or neighboring to another water, such as a creek or river, which does affect interstate commerce.

Evidence was presented as to each of these three definitional elements, although proof as to any one of the three would have been sufficient to show that the definition was met.

The Third Circuit recently has rejected arguments similar to those advanced by defendant, in United States v. Pozsgai, 999 F.2d 719, 730-31 (3d Cir. 1993). Where evidence at trial had been submitted showing that the wetlands on the defendant's property were intersected by a stream which was a tributary of the Pennsylvania Canal, which flowed into the Delaware River, the district court's conclusion that the wetland was adjacent to "waters of the United States" was affirmed. Id. The Pozsgai court found that the evidence was as persuasive as that found to be adequate in similar cases. E.g. Quivera Mining Co. v. United States EPA, 765

F.2d 126, 130 (10th Cir. 1985) (non-navigable creeks and "arroyos" affect interstate commerce because during times of "intense rainfall" there could be a surface connection between these waterways and navigable streams), cert. denied, 474 U.S. 1055, 106 S.Ct. 791 (1986); United States v. Ashland Oil and Transportation Co., 504 F.2d 1317, 1329 (6th Cir. 1974) (Act constitutionally applies to discharge of oil into non-navigable tributary three waterways removed from navigable river).

In Pozsgai, the Third Circuit also considered and firmly rejected arguments similar to the defendant's regarding the constitutionality of the "waters of the United States" definition under the Commerce Clause. The Third Circuit Court of Appeals specifically rejected the notion, argued by defendant, that the Commerce Clause requires some showing that the defendant's activity had some individualized effect on interstate commerce in order for the law to apply. The Court explained:

> Under the [Clean Water] Act, the Corps, acting under its statutorily delegated authority to establish the permit program, 33 U.S.C. § 1344, has determined that wetlands which are adjacent to tributaries of waters usable or formerly used in interstate commerce themselves affect interstate commerce.

Poszgai, 999 F.2d at 733 (citing cases upholding the regulation against constitutional attack on Commerce Clause grounds).[7]

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[7] The defendant may attempt to rely on the Supreme Court's recent decision in United States v. Lopez, ___ U.S. ___, 1995 WL 238424 (April 26, 1995). That decision does not support the defendant's commerce clause claim for numerous reasons. First, congressional authority to legislate regarding matters affecting the waters of the United States is at the very core of the commerce clause of Article 1, section 8, of the Constitution. The need for uniform federal regulation of interstate commerce, including the waters of the United States, rather than having each of the newly independent states impose conflicting regulations over such matters, was one of the primary motivations for the creation of the Constitution itself. Congressional regulation of matters relating to waters of the United States does not therefore give rise to the federalism concerns relating to federal interference with state regulation of local schools which prompted Justices Kennedy and O'Connor to concur in the results in Lopez. The concurrence of those two justices was essential to the decision in that case. Secondly, the facts of this case satisfy all three "categories of activity that Congress may regulate under its commerce power," i.e. (a) the regulation of "the use of the channels of interstate commerce," (b) the "regulat[ion] and protect[ion of] the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and the regulation of "activities having a substantial relation to interstate commerce." Lopez, 1995 WL 238424, p. 6. (Emphasis added). Though regulation under any one of the three categories is legitimate, Rapanos refers only to the third of these three categories. However, the Wickard v. Fillmore concept that the "regulation[] of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce[,]" is

Defendant is incorrect in asserting the requirement of a showing that the defendant's activity had some individualized effect on interstate commerce.[8] The jury was

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constitutional was re-affirmed in Lopez, id., p. 8. (Emphasis added). For reasons stated in the main text of this section the government submits that the aggregate effect of the destruction of wetlands, such as that caused by Rapanos, satisfies even the third category of permissible regulation by Congress under the commerce clause. Finally, the concern expressed in Lopez that there were no congressional findings to substantiate that the regulation of firearms in local school zones was connected to commerce, and no rational connection could be inferred by the plurality, is absent in this case. Extensive legislative history supporting the enactment of the Clean Water Act of 1977, found in 1977 U.S.C.A.N. 4326, includes the following, "There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife." 1977 U.S.C.A.N. at 4336. See also the findings regarding wetlands in 40 C.F.R. §§230.1, 230.20-230.54. The rational basis for the protection of wetlands pursuant to the commerce clause could be inferred by anyone with a rudimentary knowledge of ecology but, in this case, such inferences need not be drawn for the pertinent findings have been made and are a matter of law.

[8] Defendant's reliance on Wickard v. Fillmore, 317 U.S. 111; 63 S.Ct. 82 (1942) continues to be misplaced. The Wickard case actually supports the government's position, because, in that case, the Supreme Court held that even a farmer who grew wheat only for his own consumption could be subjected to federal

correctly instructed of the definition of "waters of the United States." The evidence submitted was sufficient to show that the wetlands at issue met that definition, and consequently the jurisdictional interstate nexus was established.[9]

Finally, defendant's argument concerning the definition of "adjacent," previously raised at the time of jury instructions, remains unsupported. There is no requirement in the law that a wetland be adjacent to an "open body of water." This Court considered defendant's argument on this point at the time jury instructions and rejected it. Defendant persists in resting upon dicta in a concurring opinion by Judge Merritt in United States v. Larkins, 852 F.2d 189, 193 (6th Cir. 1988), in which Judge Merritt wrote only to indicate that the majority opinion did not decide the issue of whether there was a requirement that the land be adjacent to an open body

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production quotas regulation because, in the aggregate, such home consumption could compete with wheat grown for sale, and therefore would affect interstate commerce. That is the type of effect that the Wickard court found to be "substantial" enough to permit regulation under the Commerce Clause. Similarly, the "waters of the United States" definition has been drafted to encompass waters, the pollution of which, taken in the aggregate, would affect interstate commerce.

[9] Defendant also continues to rely upon a vacated decision of the Seventh Circuit, Hoffman Homes, Inc. v. Administrator, EPA, 961 F.2d 1311 (7th Cir. 1992), vacated, reh'g granted, 999 F.2d 256, 261 (7th Cir. 1993) (holding that connection to interstate commerce may be "potential rather than actual, minimal rather than substantial," but concluding that EPA's administrative finding that wetland "Area A" was a resting place for migratory birds was not supported by substantial evidence).

of water. Judge Merritt's singular view on this issue is not authoritative. The United States Supreme Court, in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S.Ct. 455, 461 (1985), held proof sufficient to show adjacency when the evidence was that the wetlands on the defendant's property extended to other wetlands,which were themselves connected to the Black Creek, a navigable waterway. Under that holding, the evidence presented in this case meets the test. The evidence showed that the wetlands on defendant's property were connected to the Lobodzinski Drain, which was connected to the Hoppler Creek, which was connected to the Kawkawlin River, a navigable waterway which is itself connected to an open body of water, Saginaw Bay.[10]

Defendant's reliance on the testimony of defense witness Bruce Jones is unavailing. Mr. Jones failed to measure the level of the water in the drains before he did his drainage calculations. This critical error rendered his calculation inaccurate, and the jury was entitled to disregard it. Moreover, even if Mr. Jones' calculations had been accurate, his conclusions could rationally have been rejected by the jury because the government submitted proof that the wetlands had in fact existed in areas adjacent to the drains on defendant's property. Consequently, the jury reasonably could have chosen, and did in fact choose, to credit the

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[10] Defendant's arguments regarding groundwater are inapplicable, because the government did not allege that the hydrological connection was by way of groundwater. The proof was that the connection was by way of surface waterways.

government's eye-witnesses, who had seen hydrophytic plants, hydric soils, and standing water, adjacent to the drains, instead of crediting Mr. Jones, who worked out a mathematical calculation without first inspecting the property, in order to prove that the wetlands adjacent to the drains did not exist.

Where the regulations are unambiguous in defining the term "adjacency," as well as "waters of the United States," this Court did not err in adopting the regulations' verbatim language in its jury instruction, in lieu of the defendant's preferred gloss on . . .

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

[Filed March 28, 1995]

File No. 93-CR- 20023-DT

UNITED STATES OF AMERICA,)
Plaintiff,)
)
v.)
)
D-1 JOHN A. RAPANOS,)
Defendant.)
)

The Hon. Lawrence P. Zatkoff

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR DIRECTED VERDICT OF ACQUITTAL AND NEW TRIAL

* * * * *

[page 11]

. . . Rapanos admitted digging in September of 1991, were already in existence at least by February, 1990, the date of the Government drawing which is Exhibit 37.

Further, Gerald Winn had testified on February 13, 1995 in re-cross examination, between 10:25 a.m. and 10:45 a.m., that he did not know if any material allegedly side cast from the ditch on the north border of the Pinnow property was side cast into wetlands, and further testified that the ditch on the east side of the property was side cast onto the top of sand. An examination of Gerald Winn's photos of October 23, 1991 (Exhibit 51.1) demonstrate that these allegedly new or newly deepened ditches are in areas which are now crop land, and not wetlands. Whether these areas are converted wetlands, or whether these areas had never been wetlands, the fact of the matter is that any side casting from these ditches in September of 1991, was into non-wetland crop land.

It must also be noted that the ditch to the north of the Pinnow property and a substantial portion of all other ditches described by Winn are outside of the 29 acres delineated as wetlands by the MDNR. Further, there were no soil samples taken in the vicinity of any of Winn's ditches to demonstrate that any side casting had actually occurred and the vicinity of these ditches.

Winn testified on February 13, 1995, between 9:00 a.m. and 9:40 a.m. that there was no problem clearing a ditch if there was no side casting into adjacent wetlands. The Government's proofs have failed to establish that at the time any work was done on these ditches that there existed any adjacent wetlands in which side casting could be placed. There is a complete failure of the Government's proofs with respect to Count 4 of the indictment.

IV. THE GOVERNMENT FAILED TO ESTABLISH ANY EVIDENCE SHOWING THAT ANY ACTIVITY BY DEFENDANT HAD AN EFFECT ON INTERSTATE COMMERCE

No evidence was introduced from which the jury could find that the movement of inert soils on the Salzburg parcel had any effect on the commercial carp harvest in Saginaw Bay, or on any other aspect of interstate commerce.

The jury was instructed that an element of the offense was "that the discharge was into waters of the United States". The instructions defined "waters of the United States" as follows:

> . . . or wetlands, the use, degradation, or destruction of which could affect interstate or foreign commerce, including any such waters from which fish or shell fish are or could be taken and sold in interstate or foreign commerce.
>
> The definition of waters of the United States also include tributaries of waters which I have identified, and wetlands adjacent to waters of the United States.

There was absolutely no evidence introduced from which the jury could find that the degradation or destruction of the wetlands alleged on the Rapanos property "could effect interstate or foreign commerce". The sole testimony relating to interstate commerce is the testimony of Mr. Beardsley, a commercial fisherman, who testified that he harvested carp

from the Saginaw Bay and sold to out of state vendors. There is no testimony whatsoever that the destruction of the wetlands either "did" or "could" affect the nature of the carp harvest in Saginaw Bay. In fact, Hal Harrington from the DNR testified that after "destruction" of the alleged wetlands, he observed carp spawning in the Hoppler ditch south of US10 spawning.

Further, the alleged "fin" of a fish identified by Hal Harrington as belonging to a carp, was located in the Hoppler creek, and not in the "waters" on the Rapanos property which were allegedly wetlands. Therefore, the Rapanos property cannot be classified under 33 CFR Section 328.3(a)(3)(ii) as waters from which fish could be taken and sold in interstate commerce.

The carp connection of the Rapanos property to interstate commerce is extremely tenuous and required the jury to engage in speculation to find a connection to interstate commerce. Basing a connection to interstate commerce on the fin of a fish identified in a roadside ditch more than 10 miles from Saginaw Bay is so tenuous that it must be called speculative, and is insufficient to support any jury verdict of guilt beyond a reasonable doubt.

To the extent that the instruction defining "waters of the United States", as drawn from 33 CFR Section 328.3(a)(3)(ii), allows the jury to find a substantial impact on interstate commerce simply from the presence of carp in the Hoppler ditch, without the showing of the necessary nexus between the filling of the wetlands and in impact on intestate commerce, the instruction invaded the province of the jury, and allowed the jury to find the existence of waters of the

United States, without being required to make the necessary factual finding of an actual impact on interstate commerce from the filling activity. The actual impact on interstate commerce by any particular activity is a factual matter which must be resolved by the jury. To the extent that the instructions took this factual issue away from the jury, the Defendant was denied his Sixth Amendment right to trial by jury.

The commerce clause, U.S. Constitution Article I, Section 8 clause 3 authorizes congressional regulation of activities which effect interstate commerce. **US v Rightwood**, 315 US 110; 62 S Ct 523; 86 L Ed 726 (1946). An activity may be reached by Congress "if it exerts a substantial economic effect on interstate commerce" (emphasis added) irrespective of whether the effect is considered direct or indirect. **Wickard v Filmore**, 317 US 111; 63 S Ct 82; 87 L Ed 122 (1942).

In **US v Byrd**, 609 F2d 1204 (CA 7, 1979) the court found "the potential for exerting a substantial economic effect on interstate commerce by an easily traced change of causation." (609 F2d, p1210) In the present case no evidence was submitted to the jury to suggest that the movement of inert soils on the land had any impact of any nature on the commercial carp harvest in Saginaw Bay. The Seventh Circuit Court in **Hoffman Homes, Inc. v EPA**, 961 F2d 1310 (CA 7, 1972), vacated 975 F2d 1554 (CA 7, 1992) held that "area a" was not within the reach of the commerce clause:

> In this cause however, the EPA has not even attempted to construct a theory as to how filling area a affects interstate commerce. And,

> no evidence on the record would support any such theory. For example there is no evidence that filling area a would affect navigation, there is no evidence that filling area a would pollute another open body of water used for irrigation, fishing or recreational activities. There is no evidence that interstate travelers visited area a (and it is hard to imagine any purpose for their doing so). (Slip Opinion pp19-20)

Although vacated, the above Hoffman Homes analysis of the breach of the commerce clause was adopted in **Michigan Protection and Advocacy Service, Inc. v Babin**, 799 F2d 695 (ED Mich, 1992). In **Babin** the court stated:

> The court interprets the phrase "substantial effect" as having two interrelated parts. First the regulated activity alone or in the aggregate, must result in a significant quantity of interstate transactions. * * * a second, the regulated activity, alone or in the aggregate, must have a direct causal nexus to interstate commerce. It is not sufficient that the regulated activity affects another activity which, in turn, has a substantial interstate commerce affect. Rather, the interstate affect must be brought about directly by the regulated activity. (799 F Supp, p790) See also **Sarin v Samaritan Health Center**, 813 F2d 755 (CA 6, 1987), holding that denial of staff privileges at a local hospital cannot have more than de minimis effect on interstate commerce.

> Local activity may be reached by a congress if it exerts a "substantial economic effect on interstate commerce." **Wickard v Filmore, supra** 317 US, p124; 63 S Ct, p9. (emphasis added)

The movement of inert soils on the Rapanos property, which resulted a net loss of soils in the 29 acre delineated area according to the testimony of Gerald Schaefer, has not been shown to have any, much less a de minimis effect, on the speculative carp in the Hoppler Creek. The activity of the carp in the Hoppler Creek has but a speculative, or less than de minimis, effect on interstate commerce on the Saginaw Bay. . .

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed July 27, 1994]

Criminal No. 93-CR- 20023-BC

UNITED STATES OF AMERICA,
Plaintiff,

v.

D-1 JOHN A. RAPANOS,
Defendant.

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

COUNT 1

(33 USC §1311(a), and 18 USC §2)

From approximately December of 1988, to at least November of 1989, the precise times unknown to the grand jury, in the Eastern District of Michigan, Northern Division, **JOHN A. RAPANOS,** defendant herein, did knowingly

cause the discharge of pollutants as defined in 33 U.S.C. section 1362(6) into waters of the United States, that is into wetlands located in Williams Township, Bay County, Michigan, without a permit issued under 33 U.S.C. section 1344, in violation of 33 U.S.C. section 1311(a) and 18 U.S.C. section 2.

COUNT 2
(18 USC §1512)

On or about April 13, 1989, in the Eastern District of Michigan, Northern Division, **JOHN A. RAPANOS,** defendant herein, did knowingly use intimidation and threats, and did corruptly attempt to persuade Frederick Glenn Goff, with intent to cause and induce Mr. Goff to withhold a record, document or other object from an official proceeding before a judge and court of the United States relating to a possible violation of federal wetland laws contrary to 33 U.S.C. section 1311(a), that is Mr. Goff's report prepared for John A. Rapanos regarding the wetland status of land in Williams Township, Bay County, Michigan, all in violation of 18 U.S.C. section 1512(b) (2) (A).

COUNT 3
(18 USC §1512)

On or about April 13, 1989, in the Eastern District of Michigan, Northern Division, **JOHN A. RAPANOS,** defendant herein, did knowingly use intimidation and threats, and did corruptly attempt to persuade Frederick Glenn Goff with intent to hinder, delay and prevent the communication by Mr. Golf to a law enforcement officer of the commission and possible commission of a federal offense, that is a possible

filling of wetlands in Williams Township, Bay County, Michigan in violation of 33 U.S.C. section 1311(a), all in violation of 18 U.S.C. section 1512 (b) (3) .

COUNT 4

(33 USC §1311(a), and 18 USC §2)

From approximately December of 1989, to at least late October of 1991, the precise times unknown to the grand jury, in the Eastern District of Michigan, Northern Division, **JOHN A. RAPANOS,** defendant herein, did knowingly cause the discharge of pollutants as defined in 33 U.S.C. section 1362(6) into waters of the United States, that is into wetlands located in Williams Township, Bay County, Michigan, without a permit issued under 33 U.S.C. section 1344, in violation of 33 U.S.C. section 1311(a) and 18 U.S.C. section 2.

Dated: July 21, 1994 THIS IS A TRUE BILL

SAUL A GREEN /s/_____
United States Attorney Foreperson

By: /s/_____
Janet L. Parker (P34931)
Assistant U.S. Attorney
P.O. Box 217
Bay City, Michigan 48707
(517) 895-5712

District Court Superseding Indictment - 7/27/94

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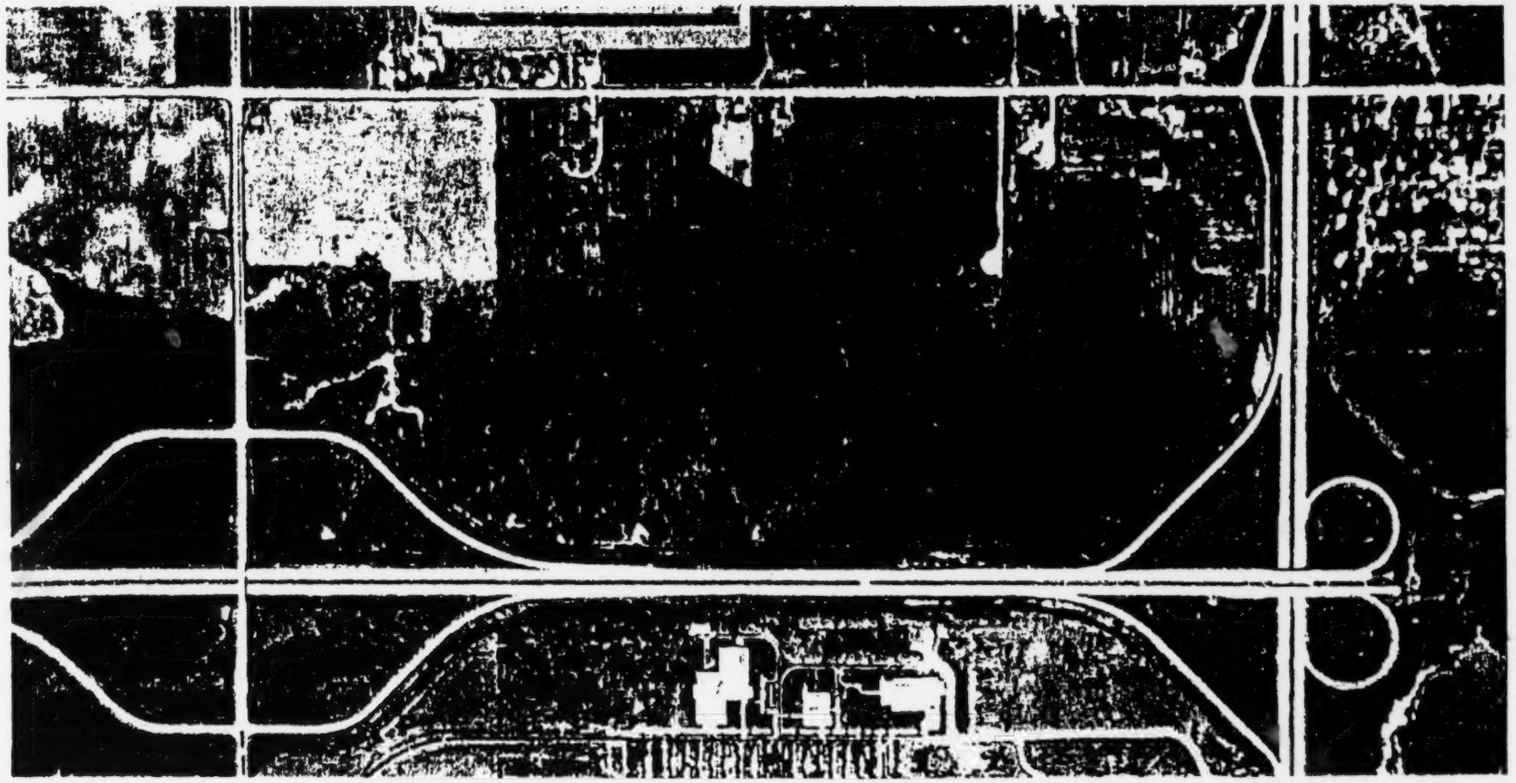

Figure 10. June 15, 1987, color infrared aerial photograph (NHAP2 523-158) depicting Site conditions shortly before clearing began. Red colors indicate plants with chlorophyll in their leaves. Blue/black signatures are often interpreted as indicative of wetlands. Note that most of the bare ground in fields and areas that are sparsely vegetated have the blue/black signature as do the steep, sideslopes of the M 47 embankment that can not have wetland hydrology. Note also that the photograph was taken about mid-morning since there are black shadows on the west side of tall trees which add to the blue/black signatures in the wooded portion of the Site.

District Court Superseding Indictment - 7/27/94

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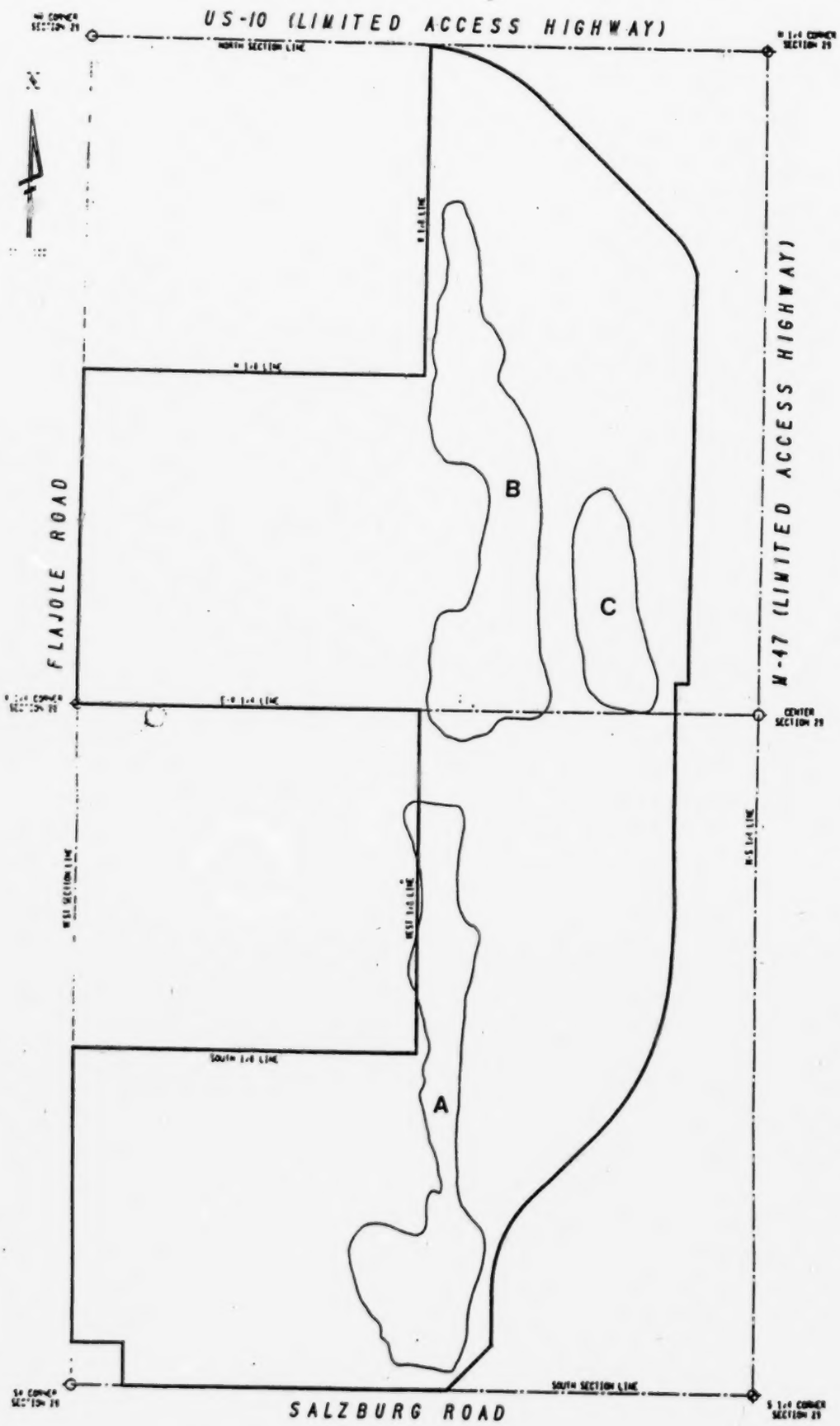

Figure 2. Property boundaries of the Salzburg Site and alleged wetlands areas. For ease of reference, the three areas have been labeled 'A', 'B', and 'C'.

BEST AVAILABLE COPY

District Court Superseding Indictment - 7/27/94

[Excerpted Transcript of Court Proceedings; page 22]

. . . charge.

You are not to consider counts 2 or 3 of the Indictment, or the fact that they are no longer a part of the Indictment or this case.

Counts 1 and 4 of the Indictment charge a violation of Title 33 of the Clean Water Act as it was written in 1989. That's the time of the alleged violation.

Section 1311 (A) of the Clean Water Act provides in part that except as in compliance with Section 1344 of this Title, the discharge of any pollutant by any person shall be unlawful. Section 1344 of the statute establishes a permit system which regulates or which requires any person who discharges dredged or fill materials in navigable waters of the United States, to have a permit or to come within one of the specified exemptions which I'll explain to you later in these instructions.

So Count 1 and 4 of the Indictment charge the defendant with knowingly discharging pollutants into wetlands which are waters of the United States, without a permit, in violation of federal law.

For you to find the defendant guilty of this crime or crimes, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt.

First, that the defendant caused a discharge. Second, that the discharge material was a pollutant as described in the federal statute. Third, that the discharge was from a point source as defined in the federal statute. Fourth, that the discharge was into waters of the United States. Fifth, that the discharge occurred between the dates of December 1988 and November 1989 as to Count 1, and between the dates of December '89 and October '91, as to Count 4. Sixth, that the defendant's actions were without a required permit. And 7th, that the defendant knew at the time, the discharge of pollutants was into wetlands, which were waters of the United States.

If you are convinced that the government has proved all of these elements as to Count 1 or Count 4, you should say so by returning a guilty verdict as to the Count or Counts which you find have been proven.

If you have a reasonable doubt about any one of these elements, you must find the defendant not guilty on the Count or Counts on which you so find.

I'm now going to instruct you as to the legal definitions which apply to some of these elements. You should understand that for the government to prove these elements beyond a reasonable doubt, the proof must meet the definitions I'm going to give you.

Okay. First we have exemptions. There are certain exemptions where you don't need a permit. The following are exemptions from the 404 permit requirements. Firstly, the maintenance, but not construction of drainage ditches, provided that the purpose of such ditch maintenance

was not to convert an area of waters of the U.S. into a use to which it was not previously subject.

Second, normal farming and silvaculture, which is tree farming, activities such as plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, provided that such activities are part of an established or ongoing operation, and that the activities are limited to physical means of cultivation and harvesting.

In addition, minor drainage of waters in the U.S. is limited to drainage within areas that are part of an established farming or silvaculture operation. It does not include drainage associated with the completed or gradual conversion of a wetland into a non-wetland. Minor drainage does not include the construction of any ditch which drains or otherwise significantly modifies a stream, lake, swamp, bog or other wetland or aquatic area constituting waters of the United States.

Any discharge of dredged or fill materials into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

If you find that the defendant's activities are exempt activities, you should find the defendant not guilty.

Okay. The term waters of the United States includes waters such as lakes, rivers, streams, including intermittent streams or wetlands. The use degradation or destruction of, which could affect interstate or foreign commerce, including any such water from which fish or

shellfish are or could be taken and sold in interstate or foreign commerce.

The definition of waters of the United States also includes tributaries of the waters that I've just identified, and wetlands adjacent to waters of the United States.

The term, discharge of a pollutant, and the term, discharge of pollutants, each mean any addition of any pollutant into waters of the United States from any point source.

The term, pollutant, is defined as dredged soil, biological materials, rock and sand, discharged into waters. The government is not required to prove that a specific amount of a pollutant has been discharged, or that the alleged discharge of pollutants caused any damage or harm to the environment in order to establish the offense charged under the Federal Clean Water Act.

The term, discharge, includes the discharge of a pollutant and a discharge of pollutants. The term dredged material means materials that is excavated or dredged from waters of the United States. The term discharge of dredged materials means any addition of dredged materials, including any redeposit of dredged materials into waters of the United States. The term includes any addition, including any redeposit of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channeling and other excavation.

The term fill material means any material used for the primary purpose of replacing an aquatic area with dry land, or of changing the bottom elevation of any water body. The term discharge of fill materials means the addition of fill materials into waters of the United States.

The term point source means any discernible confined and discreet conveyance, including but not limited to any container or rolling stock. You're instructed that the term point source may include equipment and machinery such as bulldozers, earth graders, excavators and dump trucks.

The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

The term prevalent vegetation refers to the plant community or communities that occur in an area during a given period. The prevalent vegetation is characterized by the dominant species that comprise the plant community. The term dominant species refers to a plant species that exerts a controlling influence on or defines the character of a community.

In order to establish the sixth element of the offense, that is the absence of a required permit, the government must show that the defendant did not have at the time of the alleged filling, a written permit issued by the State of Michigan, Department of Natural Resources, to discharge

pollutants, including dredged or fill material, into waters of the United States.

The term adjacent means bordering, contiguous or neighboring. Wetlands separated from other waters of the United States by manmade dikes or barriers, natural river berms, beach dunes and the like, are adjacent wetlands.

Actual knowledge must be proven beyond a reasonable doubt. In determining whether the defendant acted knowingly, you should consider all of the information that was available to him. Knowledge involves a person's state of mind. This requirement applies to all of the elements of Counts 1 and 4.

Whether the defendant acted knowingly may be proven by the defendant's conduct and by all the facts and circumstances surrounding this case.

Interstate or foreign commerce means traffic between states or countries. Interstate or foreign commerce occurs when something of value crosses a state or country line.

You've heard the defendant testify in this case. Earlier I talked to you about the credibility or believability of other witnesses, and I suggested some things for you to consider in evaluating each witness' testimony. You should consider those same things in evaluating the defendant's testimony.

The punishment provided by law for the offenses charged in the Indictment is a matter exclusively

within the province of the Court, and should not be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused. Upon retiring to the jury room, you should select one of your number to act as your foreperson. Your foreperson will preside over your deliberations and be your spokesperson here in Court.

Your verdict must represent the considered judgment of each juror. In order to return a verdict in this case, it's necessary that 12 out of 12 jurors agree, in other words, your verdict must be unanimous.

It's your duty as jurors to consult with one another and deliberate with the view to reaching an agreement, if you can do so without doing violence to your own individual . . .

* * * * *

[page 34]

THE COURT: Any objection to that?

MR. BERG: No objection.

MR. HAYWOOD: No objection.

THE COURT: Let's just change it in ink.

MR. WILDEBOER: May it please the Court, I think you already are preserving -- we'd like to preserve our objection and object again to certain re-instructions, 13 D.

concerning the permit, 14 D. concerning interstate commerce, 15 D. concerning adjacency, and we'd also like to renew our objection to the definitions of the exemptions given, and not federal exemptions, state exemptions.

MR. BERG: Just briefly for the record, as to the exemptions given, I think the record should reflect that the Court has been advised in the government's brief that essentially state exemptions are narrower and not broader than the federal exemptions. I've been advised by the Michigan State Attorney Generals' office to that effect.

In addition, I have a document I intend to file with the Court, state -- side by side analysis of the federal and the State Clean Water Act Provision, the Wetland Protection Provision which includes an analysis of the exemptions itself, which was submitted to the EPA and allowed the EPA to approve Michigan.

It indicates in that side by side analysis, as well, that the exemptions of Michigan law are the same or stricter than the federal law. So the defendant is not prejudiced in any way, and the Court's ruling on that is entirely correct.

THE COURT: I've already ruled on it, so I don't think it's necessary to put anything on the record. The record is preserved and perhaps some other Court will review that, but I'm not reviewing it.

MR. HAYWOOD: Our purpose, Your Honor, was only to, in effect to preserve that for further argument. We obviously don't necessarily agree with counsel.

THE COURT: Anything further anybody wishes to place on the record with respect to the instructions that were just given to the jury?

MR. HAYWOOD: Nothing further by defense, Your Honor.

MR. BERG: The Court's aware of the government's concern about that one instruction, Your Honor, and I think the Court's ruling is clear. That was the seventh element.

THE COURT: All right. Then I'm going to order that -- do we have a looseleaf for that, for the instructions?

THE CLERK: A binder.

THE COURT: We're going to put these instructions into a looseleaf binder, take those into the jury, and I'm going to have Mr. Delacort take in all these exhibits.

What we're going to do is stand in recess until we hear from the jurors. It's my practice when I receive a note, . . .

Supreme Court, U.S.
FILED
MAY 14 2001
OFFICE OF THE CLERK

No. 00-1428

In the Supreme Court of the United States

JOHN A. RAPANOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's convictions under the Clean Water Act (CWA) are inconsistent with this Court's decision in *Solid Waste Agency* v. *United States Army Corps of Engineers*, 121 S. Ct. 675 (2001), which held that use of nonnavigable "isolated" intrastate waters as habitat for migratory birds is not a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA.

2. Whether petitioner is entitled to reversal of his CWA convictions based on error in the jury instructions defining the term "waters of the United States," where petitioner requested an instruction substantially equivalent to the one actually given, and where the evidence showed that the wetlands filled by petitioner were adjacent to tributaries of navigable-in-fact waters.

3. Whether, and under what circumstances, Congress has constitutional authority to prohibit the filling of nonnavigable "isolated" wetlands having no hydrologic connection to navigable-in-fact waters.

4. Whether petitioner suffered a violation of the Due Process Clause based on the government's alleged failure to prove that he had actual knowledge that the areas he was filling were wetlands.

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 235 F.3d 256. An earlier opinion of the court of appeals is reported at 115 F.3d 367.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2000. The petition for a writ of certiorari was filed on March 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on two counts of knowingly discharging pollutants into waters of the United States without a

permit, in violation of Section 301(a) of the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1311(a). He was sentenced to three years' probation and fined $185,100. Petitioner appealed the convictions, and the government cross-appealed the sentence. The court of appeals affirmed the convictions and remanded to the district court for resentencing. Pet. App. 1a-9a.

1. Section 301(a) of the CWA, 33 U.S.C. 1311(a), prohibits the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). Discharges of dredged or fill material into "waters of the United States" may be authorized by a permit issued by the Army Corps of Engineers (Corps) pursuant to Section 404 of the CWA, 33 U.S.C. 1344, or by a state agency in States, including Michigan, that have been authorized by the United States Environmental Protection Agency (EPA) to administer the Section 404 permit program. See 33 U.S.C. 1344(g)(1); 40 C.F.R. 233.70 (1995).

At the time of petitioner's trial, the regulatory definition of the term "waters of the United States" utilized by the Corps and the EPA included seven categories of waters subject to CWA permitting jurisdiction. See 40 C.F.R. 230.3(s)(1)-(7), 232.2 (1995); 33 C.F.R. 328.3(a)(1)-(8) (1995). Those categories included waters susceptible for use in interstate or foreign commerce, including tidal waters, 40 C.F.R. 230.3(s)(1) (1995); 33 C.F.R. 328.3(a)(1) (1995); interstate waters, 40 C.F.R. 230.3(s)(2) (1995); 33 C.F.R. 328.3(a)(2) (1995); and tributaries of such waters, 40 C.F.R. 230(s)(5) (1995); 33 C.F.R. 328.3(a)(5) (1995). The regulatory definition also

extended to "[a]ll other waters * * * the use, degradation or destruction of which could affect interstate or foreign commerce." 40 C.F.R. 230.3(s)(3) (1995); 33 C.F.R. 328.3(a)(3) (1995). The regulations further provided that "[w]etlands adjacent to waters [encompassed within the regulatory definition] (other than waters that are themselves wetlands)" were defined to be "waters of the United States." 40 C.F.R. 230.3(s)(7) (1995); 33 C.F.R. 328.3(a)(7) (1995).

2. Petitioner owns a 175-acre parcel of land in Williams Township, Michigan. To make the parcel more attractive for development, petitioner cleared the heavily-wooded property of trees and shrubs, and he eradicated forested wetlands on the property by filling them with sand. Petitioner carried out those activities despite warnings from his own environmental consultants and from state regulators that the property contained wetlands and that development of the area would therefore require a permit. 115 F.3d at 368-369.

3. a. On July 27, 1994, a federal grand jury returned a second superseding indictment charging petitioner with two counts of knowingly discharging pollutants into waters of the United States, in violation of 33 U.S.C. 1311(a), and two counts of witness tampering, in violation of 18 U.S.C. 1512. Pet. App. 31a-33a. The CWA counts alleged that petitioner had deposited fill material into wetlands on his property between December 1988 and October 1991. *Id.* at 31a-32a, 33a.*

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* The witness tampering counts alleged that petitioner had threatened one of his environmental consultants, Dr. Frederick Glenn Goff, for the purpose of intimidating him into keeping silent and destroying his records and reports, which had confirmed the presence of extensive wetlands on the property. Pet. App. 32a. The district court dismissed those counts at the conclusion of the government's case. Gov't C.A. Br. 4.

Petitioner's trial began on February 1, 1995. The evidence showed that until its alteration through petitioner's fill activities, the property in question contained at least 29 acres of wetlands. The evidence further demonstrated that those wetlands were hydrologically connected to a waterway known as the "Labozinski drain," which drained into Hoppler Creek, the Kawkawlin River (a navigable river), and ultimately into Saginaw Bay, a part of Lake Huron. See Gov't C.A. Br. 20; 02/01/95 Tr. 175-177.

Petitioner requested a jury instruction defining the term "waters of the United States" as follows:

> Waters such as lakes, rivers, streams (including intermittent streams), or wetlands, the use, degradation, or destruction of which could affect interstate or foreign commerce.
>
> The definition of waters of the United States also includes tributaries of the waters which I have identified, and wetlands adjacent to waters of the United States.

R. 174 (Waters of the United States). The district court instructed the jury substantially as petitioner had requested, giving the following instruction:

> The term waters of the United States includes waters such as lakes, rivers, streams, including intermittent streams or wetlands. The use degradation or destruction of, which could affect interstate or foreign commerce, including any such water from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
>
> The definition of waters of the United States also includes tributaries of the waters that I've just

> identified, and wetlands adjacent to waters of the United States.

Pet. App. 38a-39a.

The jury found petitioner guilty on both of the CWA counts. The district court subsequently granted petitioner's motion for a new trial on the ground that the government had improperly cross-examined petitioner regarding his refusal to consent to warrantless searches of his property by state regulatory officials. 115 F.3d at 371. The government appealed, and the court of appeals reversed, concluding that "the prosecutor's questions and characterization did not constitute a prejudicial comment on a defendant's assertion of a constitutional privilege." *Id.* at 374; see *id.* at 372-374. On remand, the district court sentenced petitioner to three years' probation and a fine of $185,100. Pet. App. 2a.

b. Petitioner appealed his convictions. He contended, *inter alia*, that the jury instruction defining the term "waters of the United States" was erroneous under *United States* v. *Wilson*, 133 F.3d 251, 256-257 (4th Cir. 1997), because it permitted the jury to enter a guilty verdict based on a finding that degradation of the waters on petitioner's property "could affect" interstate commerce. Pet. C.A. Br. 16-18. In response, the government contended that petitioner had invited the alleged error by proposing a jury instruction substantially equivalent to the one given by the district court, and that petitioner could not satisfy the requirements of Federal Rule of Criminal Procedure 52(b) because the wetlands in question were hydrologically connected to tributaries of navigable waters that were used as habitat for spawning commercially harvested carp.

Gov't C.A. Br. 17-22. The government cross-appealed on sentencing issues. *Id.* at 41-61.

The court of appeals affirmed petitioner's convictions and remanded for resentencing. Pet. App. 1a-9a. With respect to petitioner's appeal, the court stated only that it had "reviewed each of [petitioner's] claims and f[ou]nd that the district court did not err." *Id.* at 2a. With respect to the government's cross-appeal, the court of appeals held that the district court had erred in granting two one-level downward departures and a two-level decrease for acceptance of responsibility from petitioner's sentencing range under the Sentencing Guidelines. *Id.* at 3a-9a.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that his convictions should be vacated because the areas that he filled were not "waters of the United States" within the meaning of the CWA, as that term was construed in *Solid Waste Agency* v. *United States Army Corps of Engineers*, 121 S. Ct. 675 (2001). Petitioner suggests (Pet. 8) that the wetlands in question "must be classified as 'isolated wetlands' as they lacked a surface water connection to any other body of water." That claim is controverted by the record at trial and by the course of briefing in the court of appeals.

The government's expert testified at trial that the wetlands on petitioner's property drain into Hoppler Creek, which flows into the Kawkawlin River (a navigable river), which in turn flows into Saginaw Bay. 02/01/95 Tr. 175-177. In his opening brief to the court of appeals, petitioner contended that the jury instruction defining "waters of the United States" was deficient because it permitted the jury to find him guilty based on a potential rather than an actual effect on interstate

commerce resulting from degradation of the relevant waters. Pet. C.A. Br. 16-18; p. 5, *supra*. The government argued in response that petitioner had invited any error by proposing a substantially equivalent instruction, and that in any event petitioner had suffered no prejudice as a result of the instruction given by the district court. Gov't C.A. Br. 17-22. With respect to the latter point, the government explained that the wetlands on petitioner's property were ultimately connected through surface waters to Saginaw Bay. *Id.* at 19-20. The government further explained that, under the regulatory definition of "waters of the United States," the wetlands that petitioner filled were "adjacent" to tributaries of traditional navigable waters and therefore fell within the CWA's coverage under 40 C.F.R. 230.3(s)(1), (5), and (7). Gov't C.A. Br. 19-20. Under the regulations, proof of adjacency to tributaries of navigable-in-fact waters eliminated the need for any case-specific showing of either an actual *or* a potential effect on interstate commerce. *Id.* at 20. Petitioner's reply brief in the court of appeals was devoted solely to sentencing issues and did not attempt to refute the government's description of the surface-water connection between petitioner's wetlands and traditional navigable waters.

Nothing in *Solid Waste Agency* suggests that the hydrologic connection described above to traditional navigable waters is an inadequate basis for the exercise of federal regulatory jurisdiction over petitioner's wetlands pursuant to the CWA. The Court in *Solid Waste Agency* rejected the government's contention that use of nonnavigable "isolated" intrastate ponds as habitat for migratory birds was a sufficient basis for treating those ponds as "waters of the United States" within the meaning of the CWA. 121 S. Ct. at 683-684.

The Court referred, however, with apparent approval to its prior holding that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *Id.* at 680 (quoting *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985)). This case falls within the principle of *Riverside Bayview*, not *Solid Waste Agency*.

2. The district court instructed the jury at petitioner's trial that "[t]he term waters of the United States includes waters such as lakes, rivers, streams, * * * [t]he use degradation or destruction of[] which could affect interstate or foreign commerce." Pet. App. 38a. That instruction did not by its terms require the jury to find that petitioner's wetlands were hydrologically connected to (or could otherwise be expected to affect the quality of) navigable-in-fact waters. Thus, the instruction given by the district court might in theory have resulted in a conviction based solely on the sort of connection to commerce—*e.g.*, use of the wetlands as habitat for migratory birds—that was held in *Solid Waste Agency* to be an impermissible basis for the exercise of federal regulatory jurisdiction under the CWA.

Petitioner did not object to the pertinent instruction, however, and indeed proposed an instruction defining the term "waters of the United States" in a substantially identical manner, which effectively invited the error of which he now complains. He thus should not be entitled to raise that issue in this Court. See, *e.g.*, *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) ("As the city itself proposed the essence of the instructions given to the jury, it cannot now contend that the instructions did not provide an

accurate statement of the law."); *United States* v. *Young*, 745 F.2d 733, 752 (2d Cir. 1984) ("not even the plain error doctrine permits reversal on the ground that the trial court granted a defendant's request to charge"; citing cases), cert. denied, 470 U.S. 1084 (1985); *United States* v. *Barrow*, 118 F.3d 482, 490-491 (6th Cir. 1997) (same); but see *United States* v. *Perez*, 116 F.3d 840, 844-846 (9th Cir. 1997) (en banc). If petitioner is not foreclosed from raising this issue by his own proposed jury instruction, he can obtain relief based on instructional error only if he can satisfy the requirements of Federal Rule of Criminal Procedure 52(b), which provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *United States* v. *Olano*, 507 U.S. 725 (1993), this Court explained that under Rule 52(b), a criminal defendant who fails to object to an alleged error at trial is entitled to relief on appeal only if he can make four distinct showings. The defendant must establish that the district court committed (1) an "error" (2) that was "plain," in the sense of "clear" or "obvious," and (3) that "affec[ted] [his] substantial rights." 507 U.S. at 732-735. Even when those showings are made, a reviewing court may exercise its discretion to reverse a conviction for plain error only (4) "if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (internal quotation marks omitted).

Insofar as the district court's instruction defining the term "waters of the United States" would have allowed the jury to find the jurisdictional element satisfied based solely on migratory bird use, the error in the instruction is "clear" or "obvious" after this Court's decision in *Solid Waste Agency*. See *Johnson* v. *United*

States, 520 U.S. 461, 468 (1997) (holding that "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."). Petitioner cannot satisfy the third and fourth requirements for relief under Rule 52(b), however, because he suffered no prejudice as a result of the instructional error. As we explain above, the evidence at trial established the existence of a surface-water connection between petitioner's wetlands and navigable-in-fact waters. Indeed, the government sought to prove the potential effect on interstate commerce required by the district court's instruction by introducing evidence that petitioner's wetlands drained into tributaries of navigable waters, that the tributaries supported spawning of carp, and that carp were commercially harvested downstream. See 02/01/95 Tr. 177-188; 02/09/95 Tr. 115-130; Gov't C.A. Br. 21.

Thus, unlike in *Solid Waste Agency*, the interstate commercial nexus asserted by the government in this case was itself dependent on the existence of a surface connection to navigable-in-fact waters. Although the instruction standing alone might have permitted the jury to find petitioner guilty based on migratory bird use, the actual course of proceedings at trial eliminates any meaningful danger that such a result occurred. The defect in the district court's instructions therefore did not "affect substantial rights" or "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 734, 736.

3. Petitioner contends (Pet. 11-14) that this Court should grant certiorari to decide the question, left unresolved in *Solid Waste Agency*, whether and under what circumstances Congress may constitutionally extend federal regulatory jurisdiction to cover non-

navigable "isolated" waters lacking any hydrologic connection to traditional navigable waters. As we explain above, however, the wetlands involved in this case do not fall within that category. This Court's resolution of the constitutional issue raised by petitioner can therefore have no practical effect on the proper disposition of the instant case.

4. Petitioner contends (Pet. 14) that his convictions were obtained in violation of the Due Process Clause because the government failed to prove that petitioner "knew that the areas into which he was placing fill were wetlands." Petitioner asserts (Pet. 14) that government counsel disclaimed any attempt to prove such knowledge. The statement quoted by petitioner, however, simply reflected counsel's view that the government was not required to prove petitioner's knowledge of the downstream hydrologic connections that brought his wetlands within the regulatory definition of "waters of the United States." See 03/03/95 Tr. 10.

Petitioner does not contend that the jury was improperly instructed on the scienter element of the criminal charges. And the evidence of petitioner's knowledge of the physical characteristics of the filled area was fully sufficient to satisfy statutory and constitutional requirements. As the court of appeals noted on petitioner's prior appeal, the record showed that petitioner undertook his filling activities despite warnings from both state regulators and his own consultant that the property contained wetlands for which a permit was required. 115 F.3d at 368-369.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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